

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Communications Assistance for
Law Enforcement Act)

CC Docket No. 97-213

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**REPLY COMMENTS OF AT&T CORP.
REGARDING PUBLIC NOTICE ON
CALEA TECHNICAL CAPABILITIES**

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, AT&T Corp. and AT&T Wireless Group (collectively "AT&T") respectfully submit these reply comments concerning the Commission's *Public Notice*¹ implementing in part the Communications Assistance for Law Enforcement Act of 1994 ("CALEA").²

AT&T, and nearly every other party to this proceeding, have advocated that the Commission reject, as contrary to the statute, the government's requested modifications of J-STD-025 to include the four punch list items that were vacated by the United States Court of Appeals for the District of Columbia Circuit.³ This is because the four items do not provide law enforcement with access to "call-identifying information." The requested punch list capabilities also fail to satisfy the cost criteria of Section 107(b) of CALEA. The costs associated with

¹ Commission Seeks Comments to Update the Record in the CALEA Technical Capabilities Proceeding, *Public Notice*, CC Docket No. 97-213, DA 00-2342 (rel. Oct. 17, 2000).

² Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in 18 U.S.C. § 2522, and 47 U.S.C. §§ 229, 1001-1010).

³ *United States Telecom Association, et al. v. Federal Communications Commission*, No. 99-1442, slip op. (D.C. Cir. Aug. 15, 2000).

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implementing these features are exorbitant, cannot be deemed cost-effective by any stretch of the imagination, and may cause some carriers to pass those costs onto residential ratepayers. Given its statutory obligation to establish cost-effective technical requirements, the Commission should give serious consideration to the proposed alternative methods for law enforcement to obtain the same information at a substantially lower cost.

Additionally, the punch list capabilities are inconsistent with the Commission's obligation to protect the privacy and security of communications not authorized to be intercepted. Even the government acknowledges that the post-cut-through dialed digit extraction capability would cause law enforcement to intercept the contents of communications to which they are not entitled under a pen register order.

Accordingly, AT&T urges the Commission to uphold the industry's safe-harbor standard, J-STD-025. This standard reflects the combined technical opinions and efforts of the world's leading systems engineers and should only be overruled upon a clear showing of deficiency. To date, such a showing has not been made.

AT&T also supports the suspension of the September 30, 2001 compliance date for certain assistance capabilities under CALEA. The Court's decision has created an enormous amount of uncertainty in the industry about how to proceed. The Commission therefore should suspend the September 30, 2001 compliance deadline and establish a single compliance date at the end of the Commission's proceedings for all features that the Commission eventually determines are required by CALEA.

Finally, consistent with its opening comments, AT&T will refrain from addressing in any detail the packet-data considerations that flow from the Court's decision, because the Commission's *Public Notice* did not request comment on these issues. Nevertheless, a few

commenters have raised important issues that the Commission should consider as part of a separate rulemaking.⁴ In particular, as noted by Cisco Systems, depending upon what requirements the Commission imposes, compliance with CALEA will obligate extensive redesign not only of existing packet technologies, but would seriously impact the design and development of future technologies.⁵ As has been noted to the Commission on numerous occasions, packet technology is predicted to continue a rapid expansion into the communications infrastructure over this decade. Thus, a careful consideration of the technical uncertainties that currently exist with respect to CALEA compliance for packet-mode technologies is far more important at this juncture than a feverish effort to abide by an arbitrary deadline with which it is currently impossible to meet.

Accordingly, AT&T respectfully suggests that the Commission suspend the September 30, 2001 compliance deadline for packet-mode capabilities and proceed with a *Public Notice* or other appropriate regulatory path that establishes a reasonable schedule for considering the complex technical issues that have been raised in the TIA's Joint Expert Meeting report.⁶ Should it rule otherwise, the Commission risks curtailing the development of future packet-data technologies – a result that Congress intended that CALEA not foster.⁷

⁴ See e.g., Comments of Cisco Systems, Inc., CC Docket No. 97-213 (Nov. 16, 2000); Comments of the Cellular Telecommunications Industry Association, CC Docket No. 97-213, at 19-20 (Nov. 16, 2000).

⁵ Comments of Cisco Systems, Inc. at 7.

⁶ Report on Surveillance of Packet-Mode Technologies by the Telecommunications Industry Association, CC Docket No. 97-213 (Sept. 29, 2000).

⁷ See e.g., 47 U.S.C. §§ 1006(b)(4), 1008(b)(1); H.R. Rep. No. 103-827, at 9, 19 (1994).

I. THE DOJ/FBI SHOULD CONSIDER ALTERNATIVE MEANS OF OBTAINING THE INFORMATION SOUGHT SINCE THE REQUESTED PUNCH LIST ITEMS DO NOT SATISFY THE COST CRITERIA OF SECTION 107(b)

The DOJ/FBI's attempt to characterize the aggregate costs of implementing the J-Standard and the punch list capabilities as "remarkably small" is misleading.⁸ While the costs *may* indeed be lower than the estimates offered by industry commenters earlier in this proceeding, the costs nonetheless remain excessive and would be unreasonably burdensome for industry and its customers. It is difficult to fathom how the DOJ/FBI can describe a \$346.8 million expenditure (for *software* solutions alone) as being "remarkably small." It is important to note that the quoted cost estimate represents merely the results of the negotiated buy-out agreements between the government and four of the switch manufacturers – AGCS, Lucent, Nortel and Siemens. This figure will significantly increase if and when agreements are reached with two of the largest equipment vendors: Motorola and Ericsson.⁹ In addition, there are no buy-out agreements with the various second-tier manufacturers who face the burden of constructing these expensive features and selling them at retail to their carrier customers who will then likely be forced to pass those costs on to their subscribers.

In addition, the cost data supplied by the government fails to account for the substantial hardware modifications that will have to be undertaken should carriers be forced to provide

⁸ See Remand Comments of the U.S. Department of Justice and the Federal Bureau of Investigation, CC Docket No. 97-213 (Nov. 16, 2000).

⁹ Like the Cellular Telecommunications Industry Association, AT&T is concerned that an uneven playing field will be created if the government purchases the CALEA solution from only some vendors. See Comments of the Cellular Telecommunications Industry Association at 23. The Commission is obliged to consider the impact of competition in the provision of telecommunications service. See 47 U.S.C. § 160 (1999). Continued selectivity by the government in its buy-out agreements will unfairly reward some carriers and penalize others, based only on the supplier(s) of the carrier's legacy equipment.

additional assistance capabilities, most notably post-cut-through dialed digit extraction. The post-cut-through dialed digit extraction capability requires extensive hardware modifications, including the installation of additional tone decoders. With thousands of lines that may need to be tapped simultaneously under the FBI's capacity notice, and the typical decoder costing over \$200, the financial consequences of the Commission's ruling are far more significant and burdensome than portrayed by the government.¹⁰

Contrary to statements made by the DOJ/FBI, feasible, alternative methods have been proposed to enable law enforcement to obtain the capabilities they seek, particularly with regard to the post-cut-through dialed digit capability. For example, AT&T and other parties have recommended that the Commission consider requiring law enforcement to extract post-cut-through dialed digits using their own decoders.¹¹ AT&T noted that while this alternative would require agencies to purchase a limited number of tone decoding collection devices (and, in some cases, obtain a leased line to convey the content), it would be much less expensive and more efficient than requiring every switch in the nation to be overhauled to provide the dialed digit extraction capability. Moreover, this methodology of extracting post-cut-through dialed digits would better protect the privacy and security of those communications not authorized to be intercepted – a key requirement of CALEA and a core component of the Court's decision.

¹⁰ AT&T is pleased to see that the DOJ/FBI is willing to acknowledge that these "hardware add-ons for dialed digit extraction are attributable to capacity requirements" and, therefore, carriers may seek "reimbursement under the capacity provisions of [DOJ's] cost recovery regulations." *See* Remand Comments of DOJ and FBI at 40.

¹¹ Comments of AT&T Corp., CC Docket No. 97-213, at 12 (Nov. 16, 2000); *see also* Comments of Cingular Wireless, LLC, CC Docket No. 97-213, at 8 (Nov. 16, 2000); Comments of the Personal Communications Industry Association, CC Docket No. 97-213, at 10 (Nov. 16, 2000).

The Commission's own estimates of software *and* hardware expenses (which did not include estimates from one of the largest manufacturers – Ericsson) concluded that the post-cut-through dialed digit extraction feature would cost approximately \$121 million.¹² In contrast, the FBI estimated that it would cost law enforcement agencies, at most, \$20 million per year to provide their own decoding.¹³ But most of the DOJ's estimated costs were for leased lines to convey the information (not the decoders). Since, in many cases, law enforcement will need to obtain such leased lines anyway, law enforcement's expenses would likely be much smaller. In fact, given that a decoder costs approximately \$200, it is difficult to imagine that the capital costs for provisioning every law enforcement agency with a collection device to decode post-cut-through digits would exceed \$2 million (assuming that there are even 10,000 law enforcement collection devices in the country). Regrettably, the DOJ/FBI have essentially disregarded such alternatives – proposals that would save American consumers hundreds of millions of dollars – in order to avoid having to conduct their own decoding and, perhaps, meet a slightly higher evidentiary burden.

Finally, the government's claim that its Flexible Deployment program reduces CALEA deployment costs also bears some additional examination. The DOJ/FBI state that by permitting carriers to deploy CALEA solutions as part of their normal software upgrade cycle, rather than requiring them to conduct additional CALEA-specific upgrades, carriers will avoid incurring

¹² See *In the Matter of Communications Assistance for Law Enforcement Act, Third Report and Order*, CC Docket No. 97-213, FCC 99-230, Appendix B (rel. Aug. 31, 1999).

¹³ See *Reply Comments Regarding Further Notice of Proposed Rulemaking of the Federal Bureau of Investigation and the U.S. Department of Justice*, CC Docket No. 97-213, at 64 (Jan. 27, 1999).

additional costs inherent with such a specific upgrade.¹⁴ While in theory these savings may inure to certain small carriers, the government has been withholding Flexible Deployment approvals to larger carriers, pending the results of negotiations over bulk reimbursement of installation and hardware costs for some carriers' pre-1995 switches. Regrettably, many large wireline and wireless carriers (who carry the majority of traffic and conduct the majority of surveillances) thus have failed to realize any benefits from the FBI's Flexible Deployment program.

II. THE DOJ/FBI'S REQUESTED MODIFICATIONS TO THE *THIRD REPORT AND ORDER* ARE PROCEDURALLY DEFECTIVE AND WITHOUT MERIT AND SHOULD BE DENIED

In addition to the punch list items, the DOJ/FBI now request three new modifications to the regulations adopted by the Commission in its *Third Report and Order*. The DOJ/FBI attempt to characterize the modifications as mere "clarifications" not intended to alter the substance of the Commission's decision, but rather to clarify its intended scope and operation. In reality, the modifications are procedurally defective and without merit and should be denied.

The DOJ/FBI's requests are procedurally invalid. The modifications proposed by the FBI/DOJ should have been raised in a timely petition for reconsideration following the release of the *Third Report and Order* – not over 15 months later under an express remand from federal court.¹⁵ The DOJ/FBI have had numerous opportunities to bring these proposed modifications to the Commission's attention and failed to do so. Under the Commission's Rules, the deadline for

¹⁴ See Remand Comments of DOJ and FBI at 41-43.

¹⁵ Petitions for reconsideration must be filed within 30 days from the date of public notice of such action. See 47 C.F.R. 1.429(d).

such requests has expired. Thus, the Commission should not even consider the modifications requested by the DOJ/FBI.

Moreover, AT&T sees no reason for these ostensible “clarifications.” For example, the DOJ/FBI request that the Commission’s regulations be modified so that wireline, cellular or broadband PCS carriers that fail to comply with the Commission’s regulations are ineligible for the shelter of CALEA’s safe-harbor provision.¹⁶ However, the language of CALEA is explicit. Under CALEA, carriers will be found to be in compliance with Section 103 if the carrier is in compliance with publicly available technical standards adopted by a standard-setting organization or by the Commission.¹⁷ No clarification is necessary. In fact, the DOJ/FBI’s modification would appear to confuse the already precise language of CALEA.

Similarly, the DOJ/FBI request that the Commission modify its order so that it focuses solely on a carrier’s technical capability to provide information to law enforcement, not on law enforcement’s legal authority to obtain information from the carrier.¹⁸ Again, AT&T sees no reason for the Commission to make such a modification. In fact, the modification only seems to raise questions about the punch list items requested by the DOJ/FBI – why should carriers be obligated to develop complicated and expensive technical capabilities for which law enforcement may not be authorized to use?

Third, the DOJ/FBI request that the Commission modify its rules so that the J-Standard’s definition of “call-identifying information” is left intact yet becomes subordinate to the

¹⁶ See Comments of DOJ and FBI at 59-60.

¹⁷ 47 C.F.R. § 1006(2).

¹⁸ See Comments of DOJ and FBI at 60-61.

Commission's decision regarding the punch list capabilities.¹⁹ The DOJ/FBI's request is at odds with the Court's instructions. Having found no deficiency in the standard's definitions, the FBI now suggests that the Commission circumvent its statutory obligations and impose the four punch list items anyway. The J-Standard reflects the combined expert technical opinions and efforts of dozens of the world's leading systems engineers and should be given a substantial amount of deference by the Commission. As a result, AT&T sees no reason for the Commission to grant the requested modification.

III. THE COMMISSION MUST AFFORD CARRIERS A REASONABLE AMOUNT OF TIME TO COMPLY WITH CALEA'S SECTION 103 ASSISTANCE CAPABILITY REQUIREMENTS

Like several other commenters, AT&T supports the Cellular Telecommunications Industry Association's Petition²⁰ to suspend the September 30, 2001 compliance date.²¹ In light of the uncertainty created by the Court's remand, the time necessary to consider any new evidence in this proceeding and the time needed for the Commission to render a decision, AT&T believes that suspension of the compliance deadline is well justified. Carriers are already having to make extraordinary efforts to manage three separate, CALEA-related upgrades in less than 15 months: the "core" J-STD-025, the capacity requirements (in March 2001) and, potentially, the

¹⁹ *Id.* at 61-62.

²⁰ Cellular Telecommunications Industry Association, *Petition to Suspend Compliance Date*, CC Docket No. 97-213 (Aug. 23, 2000); *see also* Comments of AT&T Corp., CC Docket No. 97-213 (Sept. 15, 2000).

²¹ *See e.g.*, Comments of BellSouth, CC Docket No. 97-213, at n. 34 (Nov. 16, 2000); Comments of the United States Telecom Association, CC Docket No. 97-213, at 14-15 (Nov. 16, 2000); Comments of the Telecommunications Industry Association, CC Docket No. 97-213, at 4 (Nov. 16, 2000).


two remaining punch list features (in September 2001). To further complicate this implementation by requiring carriers to implement the two unchallenged punch list items and packet-mode communications next September, and then undergo a potential *fourth* installation (for any additional punch list capabilities the Commission may mandate) would clearly impose an unreasonable burden upon carriers. The Commission therefore should suspend the September 30, 2001 compliance deadline and establish a single compliance date at the end of the Commission's proceedings for all features that the Commission eventually determines are required by CALEA.

IV. CONCLUSION

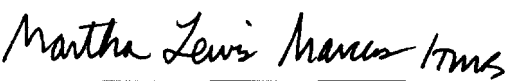
For the forgoing reasons, AT&T respectfully urges the Commission to reject the four assistance capabilities, refrain from making any decisions with respect to packet-mode technologies, deny the modifications requested by the DOJ/FBI to the *Third Report and Order*, and suspend the September 30, 2001 CALEA compliance deadline for the assistance capabilities at issue and for packet-mode technologies.

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CERTIFICATE OF SERVICE

I, Todd B. Lantor, an attorney with the law firm of Steptoe & Johnson, LLP, hereby certify that I have on this December 8, 2000 caused to be served by first class mail, postage prepaid, or by hand delivery, a copy of the foregoing Reply Comments to the following:

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